



POLICE DEPARTMENT

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In the Matter of the Disciplinary Proceedings :  
- against - : FINAL  
Police Officer Eduardo Cornejo : ORDER  
Tax Registry No. 936390 : OF  
Quartermaster Section : DISMISSAL  
-----X

Police Officer Eduardo Cornejo, Tax Registry No. 936390, Shield No. 13722, Social Security No. ending in [REDACTED] having been served with written notice, has been tried on written Charges and Specifications numbered 2015-12994, as set forth on form P.D. 468-121, January 13, 2015, and after a review of the entire record, has been found Guilty of Specification Nos. 1 and 2; and Specification No. 3 is dismissed.

Now therefore, pursuant to the powers vested in me by Section 14-115 of the Administrative Code of the City of New York, I hereby DISMISS Police Officer Eduardo Cornejo from the Police Service of the City of New York.

  
WILLIAM J. BRATTON  
POLICE COMMISSIONER

EFFECTIVE: 0001 hrs. January 13, 2016



POLICE DEPARTMENT

December 11, 2015

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In the Matter of the Charges and Specifications : Case No.  
- against - : 2015-12994  
Police Officer Eduardo Cornejo :  
Tax Registry No. 936390 :  
Quartermaster Section :  
-----X

At: Police Headquarters  
One Police Plaza  
New York, New York 10038

Before: Honorable Nancy R. Ryan  
Assistant Deputy Commissioner Trials  
October 26 and 27, 2015

APPEARANCE:

For the Department: Daniel Maurer, Esq.  
Department Advocate's Office  
One Police Plaza  
New York, New York 10038

For the Respondent: Michael Martinez, Esq.  
Worth, Longworth & London, LLP  
111 John Street - Suite 640  
New York, NY 10038

To:

HONORABLE WILLIAM J. BRATTON  
POLICE COMMISSIONER  
ONE POLICE PLAZA  
NEW YORK, NEW YORK 10038

**Charges and Specifications:**

1. Said Police Officer Eduardo Cornejo, while assigned to the 79th Precinct, on or about and between October 5, 2014 and January 2, 2015, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that Police Officer Cornejo wrongfully ingested marijuana without police necessity or authority to do so.

P.G. 203-10, Page 1, Paragraph 5 – GENERAL REGULATIONS

2. Said Police Officer Eduardo Cornejo, while assigned to the 79th Precinct, on or about and between October 5, 2014 and January 2, 2015, engaged in conduct prejudicial to the good order efficiency or discipline of the Department in that Police Officer Cornejo wrongfully possessed marijuana without police necessity or authority to do so.

P.G. 203-10, Page 1, Paragraph 5 – GENERAL REGULATIONS

3. Said Police Officer Eduardo Cornejo, while assigned to the 79th Precinct, on or about January 12, 2015, was in possession of a Kahr 9mm firearm that was not recorded on Police Officer Cornejo's Force Record as required. (*Dismissed*)

P.G. 204-08, Page 1, Paragraph 3 – FIREARMS GENERAL  
REGULATIONS

**REPORT AND RECOMMENDATION**

The above-named member of the Department appeared before me on October 26 and 27, 2015. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The Department called Police Officer Daleich Smith, Lieutenant Robert Bava and Doctor Thomas Cairns as witnesses. Respondent called Doctor Lyle Hayes as a witness and Respondent testified on his own behalf. A Stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

**DECISION**

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondent Guilty of the charged misconduct.

## FINDINGS AND ANALYSIS

The following facts are undisputed. Respondent was randomly screened for drugs on January 2, 2015. Police Officer Daleich Smith at the Medical Division collected three hair samples from Respondent's head, and sent two to Psychemedics Corporation (Psychemedics), a drug testing laboratory in California. As per Department policy, the third sample was stored at the Medical Division so that, in the event that the first two samples tested positive, Respondent could send the third sample to a lab of his choosing for independent testing. Psychemedics notified the Department that both of Respondent's hair samples tested positive for marijuana. The results reported were 1.4pg/10mg and 1.8pg/10mg. At some point after January 20, 2015, Respondent requested his third hair sample be sent for testing to Quest Diagnostics (Quest). The third sample confirmed the presence of the marijuana metabolite, but was reported at a level of .8pg/10 mg. This is below the cut-off level of 1pg/10mg hair at which Psychemedics reports positive test results to the NYPD. Respondent also had a hair sample collected on January 20, 2015, tested by LabCorp, which reported a negative result for cannabinoids (Resp. Ex. C).

### The Hair Sample Collection

The Department presented the following evidence. On January 2, 2015, Respondent was notified that he was subject to a random drug test. Approximately an hour and a half after receiving the notification, Respondent reported to the Medical Division and met with Police Officer Smith (Tr. 11-14). Officer Smith had been assigned to the Medical Division's hair unit for approximately three months prior to January 2, 2015 and had collected an average of six or seven samples a day during that time (Tr. 31).

After arrival at the Medical Division, Respondent filled out a Drug Screening Questionnaire on which he indicated that he had not taken any prescription medication in the last three months (Dep't. Ex. 1). He also completed a form indicating what alcohol and medication he had consumed in the last three days and what foods he had eaten in the last 24 hours (Dep't. Ex. 2).

According to Officer Smith, he does not specifically remember Respondent, but he adhered to standard procedures when collecting hair samples<sup>1</sup> (Tr. 34). With the Respondent present, these procedures included wiping down the table with alcohol and then covering it with white exam paper prior to each collection. He put gloves on and used sterile scissors to cut hair from Respondent's head. He divided the hair and placed it inside three separate tinfoils, which he then put into three separate cardboard envelopes, which were then placed in separate plastic bags. Each envelope and bag was sealed in front of Respondent (Tr. 21-24). Respondent initialed the envelopes and the security tape on the bags (Tr. 25-26). The custody and control forms and sample acquisition cards signed by Respondent certified that the sealed samples were his, that the hair was cut close to the skin, that he witnessed the sample collector seal the sample in the envelope and that he consented to the testing by Psychemedics (Dept. Ex. 3A, 3B, 4A, 4B).

Officer Smith placed all three of Respondent's samples in a safe within the Drug Screening Unit (Tr. 30).

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<sup>1</sup> Respondent had been randomly selected for both a hair and urine test. The Department Advocate referred to the fact that the urine test came back negative and focused the witness on the hair test procedures (Tr. 21).

The Psychemedics Results of NYPD Hair Samples

Dr. Thomas Cairns is the senior scientific advisor at Psychemedics (Tr. 69). Psychemedics has been cleared by the Food and Drug Administration (FDA) to test for drugs including marijuana and is licensed by New York State. Based on his qualifications, as cited in his curriculum vitae, which include approximately 25 publications on hair testing in peer-reviewed journals, Dr. Cairns was deemed an expert in the field of forensic toxicology and workplace hair testing (Tr. 78; Dept. Ex. 5).

Dr. Cairns explained that when an individual ingests marijuana, it enters the bloodstream which passes through the liver where the drug can be metabolized. The metabolite produced is carboxy tetrahydrocannabinol (Carboxy THC). Carboxy THC is not in the marijuana plant material or in the smoke. It can only be produced in the human body. Carboxy THC circulates to the base of every hair follicle in the body and is trapped into the hair structure. As the hair grows at the approximate rate of half inch per month for head hair, it becomes "a tape recorder" of each and every ingestion of marijuana (Tr. 81-82, 98-99).

Dr. Cairns testified that the first test that Psychemedics conducts on a sample is an enzyme immunoassay (EIA). If the EIA is determined to be presumptive positive another portion of the same sample is washed to remove external contamination and tested using mass spectrometry (MS). If MS analysis finds a presence of Carboxy THC at or above the administrative cutoff level of 1pg/10mg, the lab will test the second hair sample for confirmation. Dr. Cairns explained that the administrative cutoff level is established by Psychemedics, cleared by the FDA and adopted by the NYPD (Tr. 83-86). Only in cases where both the first and second hair samples test positive for Carboxy THC at or above



the administrative cutoff based on the MS results does Psychemedics report a positive finding to the Department (Tr. 88-89).

At trial, Dr. Cairns reviewed the laboratory data package produced by Psychemedics for the samples collected from Respondent on January 2, 2015 (Dep't. Ex. 6). The package, in which Respondent was identified by his donor identification number, showed that the chain of custody remained intact. Respondent's first sample came back from the MS analysis indicating the presence of Carboxy THC at a level of 1.4pg/10mg. Respondent's second sample confirmed the presence of Carboxy THC at a level of 1.8pg/10mg (Tr. 100-101). Both samples tested positive at a level above the administrative cutoff. According to Dr. Cairns, based on the 3 centimeters length of hair obtained from Respondent, this indicates ingestion of marijuana on multiple occasions during the 70 day period preceding the collection day (Tr. 112). Dr. Cairns characterized the difference between the two samples as scientifically "insignificant" (Tr. 101-102).

#### The Quest Results of Respondent's Third NYPD Hair Sample

Respondent testified that after learning he had tested positive based on the Psychemedics results, he requested that the third sample of head hair obtained from him on January 2, 2015, be sent to Quest Diagnostics for testing. While no documentation was submitted into evidence as to the results, nor was any witness from Quest Diagnostics presented to testify, Dr. Cairns was asked about the Quest results. He stated that the third sample tested by Quest reported a result of .8pg/10 mg (Tr. 109). Dr. Cairns testified that this result validated that the marijuana metabolite was in Respondent's system. He further stated that the Quest results always tend to be lower than Psychemedics results since they use a less efficient method of extracting the drug

from the hair samples (Tr. 109-110). Dr. Cairns explained that, while Psychemedics dissolves the hair structure to release the drug for analysis leading to an almost 100% release of the drug, Quest Diagnostics tended to cut the hair up into small lengths to leach the drugs out of only the ends of the small pieces. (Tr. 110).

#### LabCorp Test

Respondent submitted into evidence test results that he testified resulted from a hair drug screen done by LabCorp on a sample collected on January 20, 2015. The result listed for Cannabinoids was negative. It was stipulated by the parties that there was no length of hair indicated, the hair was processed as an unwashed sample, and the test done was an immunoassay test with a cutoff of 10 picograms per 10 milligrams cannabinoids, not Carboxy THC (Tr. 203; Resp. Ex. C).

#### Other Evidence Presented

In addition to the lab results presented, the Department presented one witness, Lieutenant Robert Bava. Respondent, in addition to his own testimony, presented Dr. Lyle Hayes.

Lieutenant Bava, assigned to IAB, interviewed Respondent on January 12, 2015 concerning his failure of the random test for marijuana (Tr. 47-48). Lieutenant Bava testified that when Respondent was asked if he had any explanation for his positive test, the sole explanation he gave was that in late December, 2014, he and two other officers had stopped a car that was full of marijuana smoke which came pouring out of the vehicle when the window was rolled down. Lieutenant Bava reviewed worksheets of the other two officers and neither of them had a recollection of performing this car stop with Respondent (Tr. 49-50). No arrest was made as a result of the alleged stop (Tr. 48).



The Respondent's witness, Dr. Lyle Hayes, was deemed an expert in toxicology. From 2006 to 2009, he ran Saratoga Laboratories where hair testing was done. When the laboratory closed, he became a consultant and expert witness (Tr. 155; Resp. Ex. A). He has published between 25-30 articles on toxicology and drug abuse issues, but has not published in the field of workplace hair drug testing (Tr. 155, 159).

Dr. Hayes testified that he has developed methods for hair testing of prohibited drugs and in his experience it is difficult to distinguish between external contamination and actual use. In his opinion, the field is continually evolving (Tr. 160). He also stated that with specific regard to marijuana, the THC metabolite is present in such small amounts in the hair that special instruments have to be developed and vetted to reliably measure these amounts and very few laboratories currently test for the compound (Tr. 162). Citing to a recent paper,<sup>2</sup> which found the THC metabolite present in sebum and sweat, he testified there is some evidence that the method of transfer of the metabolite into the hair is not from the bloodstream but most likely from the secretions from glands near the hair and from sweat (Tr. 162). Dr. Hayes testified that "in theory" a non-user could have the metabolite transferred to them by physical contact with a user (Tr. 163-64). He further stated that experiments in this "very difficult area to do experiments in" are going on at present (Tr. 164).

In Dr. Hayes' opinion, the Psychedics findings in this case do not prove intentional use of marijuana by the Respondent for the following reasons: 1) No one has been able to show direct transfer into the hair from inside the body, 2) The cut-off level used by Psychedics is an arbitrary level and the Society of Hair Testing recommends a

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<sup>2</sup> Moosmann, B. *et al.*, Finding cannabinoids in hair does not prove cannabis consumption. *Sci. Rep.* 5, 14906; (2015). (Resp. Ex. B).

cut-off of double the level used by Psychemedics, and 3) The Quest result reflects an extremely low level of the drug, which again raises suspicion of contamination (Tr. 170-171).

Respondent testified that he has been employed by the NYPD for ten years. During the last two years prior to the random test, he was assigned to the 79 Precinct in a Street Enforcement Team (Tr. 190-91). He also had worked for approximately seven years in the Street Enforcement Narcotic Enforcement Unit at the 67 Precinct. He has made numerous narcotics arrests and encountered a lot of marijuana smoke during vertical patrols and car stops.

Respondent denied ever smoking marijuana prior to the date of the test in this case (Tr. 196). He also denied ever intentionally ingesting or consuming marijuana, or any of its derivatives, in the several months before the random test (Tr. 209). He added that he has passed four or five other previous random drug tests (Tr. 192-193). He stated that he had no idea how marijuana could have gotten into his system. At his Department interview, where he was first notified he failed the test for marijuana, he was in shock and was just basically guessing at how he might have tested positive (Tr. 199). On January 20, 2015, he went to LabCorp and had his hair tested. He does not remember the date, but at some point after receiving the LabCorp results he asked that his third hair sample taken by the NYPD on January 2, 2015 be sent to Quest Diagnostics for analysis (Tr. 219-220). Respondent also began researching how he as a non-user of marijuana could have tested positive and he engaged the services of an expert, Dr. Hayes.

Respondent now thinks that since he dealt with many people on a daily basis who are marijuana users, he was being contaminated through them (Tr. 205). He particularly

pointed out that he fingerprinted many people and he got the sweat from their hands onto his own hands (Tr. 206). Respondent estimated he fingerprinted 60 to 70 people between October 5, 2014 and January 2, 2015 (Tr. 207). Respondent also testified that he had other physical contact with marijuana users when he performed job tasks such as removing marijuana from a person's hand, conducting frisks or even just shaking community members' hands or fist bumping people (Tr. 208).

### ANALYSIS

Respondent is charged with possessing and ingesting marijuana without police necessity or authority after a random drug test revealed the presence of marijuana in the hair samples collected by the Department.

The Department's position is that Psychemedics followed all proper procedures and determined, based on two samples of Respondent's hair, that the level of Carboxy THC in his hair exceeded the 1pg/10mg cut-off level established by the NYPD. The .8pg/10mg result obtained on the third sample tested by Quest Diagnostics confirms the presence of the marijuana metabolite in Respondent's system. That the Quest result is lower than those obtained by Psychemedics is explained by Dr. Cairn's testimony that Quest uses a less efficient extraction process to obtain the drug.

Respondent's position is that he never smoked marijuana and that there are other reasons he could have tested positive at the levels he characterizes as "low." He relies upon the testimony of Dr. Hayes as supporting the proposition that the science of hair testing is unsettled and evolving. Respondent's physical contact with marijuana users, and particularly with their sweat, in the course of his job, was put forth as a possible environmental contaminant which could have caused Respondent to test positive. Respondent contends that it is not believable to think that Psychemedics is "infallible"

and that Dr. Cairns has a vested interest in presenting Psychomedics results as being above reproach.

It is clear that the Department has the burden of proving the Specifications by a preponderance of the evidence. In this case I find that they have met that burden.

While this tribunal acknowledges Respondent's argument that it is unlikely that Psychomedics has never made a mistake, no evidence has been presented in this particular case that the positive test results were obtained through any such error. The Department adequately proved the integrity of the sample collection process, that the chain of custody was not compromised, and that Respondent's samples were accurately tested by the Psychomedics Laboratory, which is the licensed laboratory contracted to do such testing by the NYPD. Both samples tested above the cut-off level and the difference between the two levels was not scientifically significant. Dr. Cairns also testified that the machines that actually performed the tests on Respondent's samples were checked for their accuracy by the fact that samples of known concentrations were run through the machines as controls prior to Respondent's sample being analyzed. This procedure was documented in this case and showed no irregularities (Tr. 138-39; Dep't Ex. 6, 38).

In contrast, Respondent failed to present any documentation supporting the Quest lab results, the procedures they used, the controls used to check the accuracy of the testing equipment or any verification that Quest insured that the chain of custody remained intact during their handling of the samples.

Dr. Hayes' testimony also does not lead this tribunal to conclude that the Department failed to meet its burden of proof. While deemed an expert in toxicology, it must be noted that Dr. Hayes does not have the credentials that Dr. Cairns has in the

specific area in question in this case, which is workplace hair testing. Dr. Hayes, while stating that the science is evolving, also acknowledged that at this point in time it is a "theory" that a non-user could have the marijuana metabolite transferred to them through physical contact with a user. The study, introduced into evidence through him, provided only that a marijuana user could self-contaminate through their own sweat or sebum and provided no proof that a user can contaminate a non-user through these mechanisms (Tr. 173). Dr. Hayes never testified that the specific exposure Respondent claims to have had with the sweat of users was likely to have caused the positive levels reported by Psychemedics and Quest. Dr. Cairns, in contrast, did address the issue of levels of sweat. While acknowledging that a person can sweat the marijuana metabolite through their pores, he said it would only be in "infinitesimal" and low amounts. Dr. Cairns estimated that it would take contact with hundreds of gallons of sweat to reach the result levels of smoking just one marijuana cigarette. I therefore reject any argument that the results obtained by Psychemedics in this case could have resulted from the environmental contaminants of sweat or sebum.

Respondent has also argued that he should be given the benefit of the doubt because the Psychemedics results were low and the third sample came back below the cutoff level and the fourth test was negative. First, this tribunal finds that no probative weight should be given to the fourth test done by LabCorp with regard to the specifications in this case. As it was done on an unknown length of hair obtained after the date of the random test, it will have a different look-back span. Even if the hair had been taken on the same date, the testing was not performed using the same methodology as used by Psychemedics. It was not tested by using MS.

With regard to the Quest Diagnostic results, the only testimony concerning the methodology used by Quest was presented by Dr. Cairns. He credibly explained that Quest used a different testing methodology that would result in a less efficient extraction of the drug than the methodology used by Psychemedics. As the extraction was less efficient, it would be expected that the resultant level reported would be lower. The significant point is that the marijuana metabolite was still found by the Quest test and therefore Quest confirmed the positive results found by Psychemedics.

Any argument that the levels found by Psychemedics were low and therefore the Respondent should be found not guilty is rejected. The 1pg/10mg level is a level selected by the NYPD. It is the standard that must be applied. It does not matter if the result is slightly over the cut-off, it still is a positive test under the standards in place. The standard was selected to distinguish someone who has used the drug multiple times versus a one-time user with a conservative estimate built in (Tr. 85). In this case Respondent has tested above the cut-off and therefore is Guilty of Specifications 1 and 2.

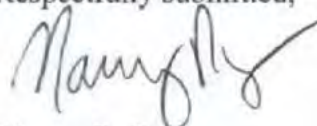
### PENALTY RECOMMENDATIONS

In order to determine an appropriate penalty, Respondent's service record was examined. *See Matter of Pell v. Board of Educ.*, 34 N.Y.2d 222 (1974). Respondent was appointed to the Department on January 10, 2005. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

Respondent has been found Guilty of possessing and ingesting marijuana without police necessity or authority. The Department has a strong interest in not employing persons who ingest and possess illegal drugs such as marijuana. Accordingly, the Court recommends that the Respondent be DISMISSED from the New York City Police

Department. *See Disciplinary Case No.* [REDACTED] (16-year member with no prior disciplinary record is dismissed from the Department for possessing and ingesting marijuana. Court rejected Respondent's argument that he may have used marijuana during alcohol-induced blackouts); *Disciplinary Case No. 81455/05*, signed August 3, 2007 (23-year member was terminated from the Department for possessing and ingesting marijuana); *Disciplinary Case No. 2014-11720*, signed April 2, 2015 (19-year member was terminated from the Department for possessing and ingesting marijuana).

Respectfully submitted,



Nancy R. Ryan  
Assistant Deputy Commissioner Trials

**APPROVED**

JAN 13 2016  
  
WILLIAM J. BRATTON  
POLICE COMMISSIONER



From: Assistant Deputy Commissioner Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM  
POLICE OFFICER EDUARDO CORNEJO  
TAX REGISTRY NO. 936390  
DISCIPLINARY CASE NO. 2015-12994

In 2013 and 2014, Respondent received an overall rating of 4.5 “Extremely Competent/Highly Competent” on his annual performance evaluation. He was rated 4.0 “Highly Competent” in 2012. He has been awarded eight medals for Excellent Police Duty and three for Meritorious Police Duty. [REDACTED]

Respondent has been the subject of one prior adjudication. In 2013, he forfeited 30 pre-trial suspension days after pleading guilty to, while off duty, consuming an intoxicant to the extent that he was unfit for duty and refusing to leave Citi Field after being directed to do so.

For your consideration.

Nancy R. Ryan  
Assistant Deputy Commissioner Trials